IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 431 of 1990

Gopal Rama Shinde ..Appellant
(Orig.Plaintiff)

V/s

1. Smt.Laxmibai Shamrao Raut
2. Dashrath Bandu Shinde
3. Ambarushi Narayan Bhosale..Respondents
(Orig.Defendants)

Shri Vishwanath Talkute for Appellant

Shri V.B.Rajure for Respondent no.1

CORAM:S.R.SATHE,J.

DATED:19th August 2004

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the Court of Additional District Judge,Solapur in Civil Appeal No.43 of 1985, whereby, the order passed by the Civil Judge, J.D. Barshi in Regular

Civil suit NO.250 of 1979 refusing to pass a decree for specific performance and returning the earnest money was confirmed and appeal was dismissed, the original plaintiff has filed this second appeal. For the sake of convenience hereinafter the parties shall be referred to as the plaintiff and defendants.

2. The brief facts giving rise to this second appeal are as under :

. The suit land was owned by the husband of defendant no.1. She had filed Special Civil Suit No.32 of 1967 against her brother in law for partition and separate possession of the said land. Not only that but a decree was passed in her favour and accordingly she had filed Darkhast NO.43 of 1963. In order to prosecute the said court proceedings she was not having sufficient money, she therefore agreed to sale the suit property to plaintiff by virtue of agreement to sell dated 8-8-1975 for consideration of Rs.20,000/-, after accepting the earnest money of Rs.5,000/-. As per stipulation of the said agreement sale deed was to be executed within 11 months. It is plaintiff's case that after the execution of such agreement defendant was again in need of money and as such the

plaintiff again paid amount of Rs.5,000/- to defendant on 29-6-1976 and additional agreement of sale was executed. Even thereafter the defendant did not execute the sale deed hence ultimately plaintiff issued notice dated 28-11-1977 to the defendant and called upon her to execute the sale deed. In spite of receipt of the notice defendant no.1 failed to execute the sale deed, hence plaintiff filed the present suit for specific performance and alternatively claimed for return of earnest money.

3. The defendant no.1 filed her written statement at Exh.21 and opposed the suit claim. She contended that when the litigation was going on against her brother in law, the plaintiff and his brother Tukaram told her that they would help her in getting possession early. As she was illiterate, no other advise was available to her and Tukaram and plaintiff being influential persons, she decided to take their help. It is her contention that plaintiff and Tukaram gave her financial help and actually advanced Rs.2500/-. They however represented that she should return the amount after she gets possession of the land, and they would get documents executed for double the amount that was paid. It is her case that accordingly plaintiff got

executed one document from her on 8-8-1975. Similarly on making such representation the defendant also executed other agreement dated 29-6-1976. It is her contention that it was not at all her intention to sell the suit property and for that purpose entered into an agreement to sell,but the plaintiff and Tukaram took undue advantage of her poor position and got agreement to sell executed by fraud and undue influence. The defendant also contended that at the relevant time the price of the suit land was more than Rs.1 lac and as such also plaintiff is not entitled for specific performance. Hence on these grounds the defendant prayed for dismissal of the suit.

4. On these pleadings the learned trial Court framed the issues and after considering the evidence adduced by both the parties came to the conclusion that agreement in question was got executed by the plaintiff by fraud and undue influence. The Court also observed that the plaintiff has failed to prove that he was ready and willing to perform his part of contract. Naturally the plaintiff’s suit for specific performance was dismissed and the defendant was directed to return the earnest money. This order was challenged by the plaintiff in the District Court,Solapur. The appellate Court also

found that the agreement in question was got executed by undue influence and finding recorded by the lower Court was legal and correct. He therefore, dismissed the appeal and confirmed the order passed by the trial Court.

5. The above mentioned order is challenged by the plaintiff in this second appeal. From the record it appears that at the time of admission of this appeal on 22-10-1990 this Court has passed the following order :-

> "Admit on grounds nos.3, 4 and 5 which are substantial questions of law.
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> 1. The finding that defendant no.1 proved that her thumb impression was taken on the agreement by making her to believe that the document was for security for loan is not supported by evidence which is legal and adequate. The evidence contrary to the terms of the document ought not to have been allowed.
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> 2. It was an error to hold that the agreement of the sale was got executed by exercise of undue influence by the

plaintiff. There is no evidence that the plaintiff was in a position to dominate the will of Defendant no.1.

3. It should have been held that the burden to establish fraud and undue influence was not discharged by the defendant no.1 and she was not absolved from her liability under the aforesaid agreement".

6. The learned advocate for the Appellant plaintiff has urged two points. Firstly, he submitted that findings recorded by the first appellate Court holding that the plaintiff got the suit agreement executed by fraud and undue influence and by misrepresenting that document by way of security was to be executed, is not legal and correct. Secondly, he canvassed before me that courts below should not have relied on the extracts produced on record to find out as to whether price of the suit land was adequate or not. He therefore submitted that appeal be allowed and decree for specific performance be passed in favour of the plaintiff. Nobody appeared on behalf of the Respondents.

7. It is not in dispute that suit lands were

initially owned by the husband of defendant no.1. It is also an admitted fact that the suit lands were subject matter of litigation and defendant no.1 was litigating against her brother in law and decree was passed in her favour. Admittedly, she had filed one Darkhast proceedings and the same was pending when alleged agreement to sell was executed. It is also not in dispute that at the relevant time the defendant no.1 was in need of money. It is also clear from the contention of the defendant as well as her deposition that agreement to sell dated 8-8-1975 as well as 29-6-1976 have been executed by her. They bear her thumb impression. The main and material question is whether the defendant no.1 was aware of the fact that she was executing an agreement to sell in favour of plaintiff or whether the said documents were executed by her relying on the representation made by the plaintiff and his brother Tukaram that such document is necessary to have some security in respect of the amount advanced by them to defendant. It is the grievance of the defendant no.1 that plaintiff and Tukaram brought undue pressure and influence on her and as a result of the same and misrepresentation the document in question has been executed. It is needless to say that when the defendant has contended that document was executed by fraud and undue influence then

burden lies on the defendant to prove fraud and undue influence.

8. In order to determine whether a particular transaction was entered into or the document was got executed by fraud and undue influence one has to take into consideration all the facts and circumstances as well as the conduct of the parties and then considering the preponderance of probabilities one has to reach to the conclusion as to whether the transaction as hit by fraud and undue influence.

9. In the instant case there are several circumstances which indicate that the plaintiff must have got document executed by fraud and undue influence and making misrepresentation to defendant no.1. It is an admitted fact that defendant no.1 is an illiterate woman, it is also admitted that at the relevant time she was hard pressed and in need of money. There was no other to advise her. As against this the position of the plaintiff was such that he and Tukaram had advanced money to defendant no.1. Besides this, they were also distinctly related to her. The plaintiff’s brother Tukaram was an influential person. He was even member of Municipal Council, so they were definitely in

dominating position. The defendant no.1 has stated in her deposition that plaintiff and Tukaram told her that they would help her in procuring the property early and relying on their words she took further steps. She also admits that some amount was advanced to her by plaintiff. But according to her, plaintiff had never paid Rs.5,000/- to her under the agreement to sell. In fact she had received only Rs.2500/- but document was executed for double the amount that was paid, by way of security. It is really very strange to find that by virtue of the said agreement all the lands of the defendant no.1, were agreed to be sold. Normally, when the defendant no.1 was litigating to acquire all the properties in which she was having share, it is difficult to believe that she would decide to sell all the properties and that too even at the time of when she had not actually received the possession of all those properties. This itself shows that real intention of the defendant no.1 must not have been to execute an agreement to sell. Incidentally it must also be noted that when this document was executed, Tukaram had taken active part in the entire transaction. He had even called the attesting wittiness. There was no one else to help and advise the defendant though an attempt was made to show that defendant no.1 was having some

relations with one Manek Kodge and she was in fact residing with him. There is no cogent evidence to show that there is any substance in this case. If really Manik Kodge was present at the time of execution of the agreement to sell, then we would have found his signature as an attesting witness. But nobody has supported the version that Manik Kodge was in fact present at the time of agreement to sell. It is pertinent to note that even the stamp paper has been produced by Tukaram. Thus, Tukaram was the person who was in fact managing the entire transaction with defendant no.1, and his brother, i.e. plaintiff was only playing nominal role. It has also come on record that Tukaram also obtained some loan from the defendant but taking undue advantage of the defendant's position, he insisted the plaintiff to enter into suit transaction. It is wroth to note that even at the time when the matter was being heard in the court, at that time also plaintiff was not present but Tukaram was present in the Court. He has deposed on behalf of plaintiff. So all these circumstances clearly indicate that Tukaram was the person who was behind the suit transaction.

10. There is another important circumstance which also indicates that real transaction may not be of

an agreement to sell. The defendant no.1 has produced the Index Register extracts of some of the properties at exh.76 to 80 to show that the sale price of the suit property mentioned under agreement to sell was grossly inadequate. The learned Advocate for the Appellant plaintiff strenuously argued before me that the lower Court should not have admitted the said extracts in evidence as the defendant no.1 had not produced the original sale deeds of the said transactions and had also not examined the parties to the said document. According to him, in the absence of such evidence it cannot be said whether the price mentioned in the Index register was reasonable or not. It is true that in order to come to a definite conclusion whether the price mentioned in the document is reasonable or not, one has to be bring on record all the facts and circumstances pertaining to the said document as well as the then existing position of the parties. But that does not mean that Index extracts which are produced on record cannot be accepted in evidence atleast to show that a particular transaction in respect of particular land was entered into and the land was old at a particular price. If we look to these transaction mentioned at Exh. 76 to 80, for this limited purpose, still then it appears that one land

admeasuring 82 R was sold for consideration of Rs.40,000/- in the year 1974. Similarly in other transaction exh.76 land admeasuring 83 R was sold for Rs.40,000/- and in third extract land admesuring 1 H 14 R was sold for Rs.25,000/- in the year 1974. While in other transaction (Exh 39) 55 R land was sold for Rs.70,000/- in the year 1977. As against this so far as the present suit transaction is concerned, we find that Bagayat land admeasuring about 35 Ares was agreed to be sold for Rs.20,000/- including right to take water to the extent of half share in the well. So if we compare this with other transaction,it appears that price agreed was also grossly inadequate. Both the Courts below have also held accordingly. From the perusal of the judgments of both the courts below, it is clear that they have taken into consideration all the facts and circumstances and conduct of the parties and have rightly arrived at the conclusion that the defendant no.1 has proved that the suit agreement was got executed by fraud and undue influence.

11. The learned Advocate for the plaintiff submitted that the Courts below have not properly appreciated the evidence and they should have considered the question of sale transaction only on scanning the judgment of the learned trial Court.

For this proposition he has placed reliance on a case Shrimati and others V/s Sudhakar R. Bhatkar and ors. reported in AIR 1998 Bombay 122 - wherein this Court has observed that unconscionable of transaction can be gone into without deciding whether one party was in a position to dominate the will of the other and whether the transaction was the result of undue influence. The proposition in this case is not disputed and cannot be disputed. However I have already mentioned above that in the instant case after scanning evidence on record it appears that plaintiff and his brother Tukaram were in fact in dominating position and taking undue advantage agreement in question was got executed.The court has also considered the other aspects of the matter viz. inadequacy of price and then observed that transaction was unconscionable. Similarly the learned Advocate for the Appellant has placed reliance on a case, Vinayakappa Suryabhanappa Dahenkar V/s Dulichand Hariram Murarka reported in AIR 1986 Bombay 193 wherein this Court has observed that inadequacy of consideration must be extreme to make contract unconscionable. So in the instant case also as the price was found to be grossly inadequate the courts below have reached to the conclusion that the transaction was unconscionable.

12. From the perusal of the judgments of both the courts below it also appears that the Court has observed that plaintiff got the agreement of sale executed by exercising undue influence. The plaintiff had also not taken proper steps for execution of the same and had in fact waited for a long time. This was probably because that the defendant no.1 had not received the actual possession of all the lands. So when such was the position there was in fact no necessity of entering into such type of transaction. The courts below have therefore observed that the plaintiff was in fact not ready and willing to perform his part of contract. So on that ground also the plaintiff's claim for specific performance has been rejected by both the Courts below.

13. In view of above, it is very clear that finding recorded by the first appellate Court to the effect that the suit agreement was got executed by fraud and undue influence is legal and correct. There is no reason to interfere with the finding recorded by the first appellate court that the plaintiff is not entitled for specific performance. In this view of the matter, there is no substance in this appeal. The appeal is dismissed with costs.

(S.R.SATHE,J.)